92-1609
No.

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IN THE

Supreme Court of the United States

October Term, 1992

JOHN PHILLIPS ORLEBECK,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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April 5, 1993

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QUESTIONS PRESENTED

1. Whether **MR. ORLEBECK** was denied his Fifth and Fourteenth Amendment rights to equal protection under the laws when the Florida trial court refused to conduct a *Batson* inquiry during jury selection after counsel for **MR. ORLEBECK** objected prior to the jury being sworn that the state had systematically struck three minority members from the venire, finding that counsel's objection was untimely.

2. Whether **MR. ORLEBECK's** Fifth and Fourteenth Amendment rights to due process and equal protection under the laws were violated when the Florida Fifth District Court of Appeal affirmed **MR. ORLEBECK's** conviction, relying upon its decisions which retroactively held that a *Batson* claim is procedurally barred from appellate review unless the defendant not only objects to the illegal peremptory strike, but makes a motion for a mistrial, motion to strike the venire panel, or a motion for continuance.

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State of Florida

John Phillips Orlebeck

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IN THE

Supreme Court of the United States

October Term, 1992

No.

JOHN PHILLIPS ORLEBECK,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

JOHN PHILLIPS ORLEBECK petitions for a Writ of Certiorari to review the decision of the Florida District Court of Appeal, Fifth District, in this cause.

OPINION BELOW

The decision of the Florida Fifth District Court of Appeal (*per curiam affirmance*, **Appendix A**) is a non-published opinion and is cited within the tables section in the So.2d Reporter at 611 So.2d 534.

JURISDICTION

The Florida Fifth District Court of Appeal affirmed **MR. ORLEBECK's** conviction on November 24, 1992. A timely petition for rehearing and/or clarification, motion for rehearing *en banc* and motion to certify questions to the Florida Supreme Court were denied on January 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, due process and equal protection under the laws.

STATEMENT OF THE CASE

Procedure

This petition follows an appeal from a judgment and sentence entered in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida (the "trial court").

Following a jury trial which began on **March 25, 1991,** the jury returned a verdict of guilty to the charge of possession of marijuana greater than 20 grams.

On **March 27, 1991**, and **October 24, 1991**, the trial court adjudicated **MR. ORLEBECK** guilty and sentenced him to three years of supervised probation. A copy of the judgment dated March 27, 1991, and sentence, dated October 24, 1991, are attached hereto as composite **Appendix B**.

A timely notice of appeal was filed and **MR. ORLEBECK** presented his grounds for appeal to the Florida Fifth District

Court of Appeal, Daytona Beach, Florida.[1] The District Court of Appeal, within the Florida judicial system, is the intermediate appellate court between the trial court, which has jurisdiction over felony offenses, and the Florida Supreme Court. Article V, § 4, Florida Constitution (1991).

MR. ORLEBECK asserted six errors on appeal, which included the following error:

> **THE TRIAL COURT ERRED IN FAILING TO CONDUCT A *NEIL* INQUIRY WHEN A TIMELY OBJECTION WAS MADE BY COUNSEL TO THE STATE'S DISCRIMINATORY STRIKING OF MINORITY MEMBERS OF THE VENIRE**

In response to **MR. ORLEBECK's** initial brief, the State filed a 14-page answer brief. As to **MR. ORLEBECK's** claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this answer brief cited at pages 6-7 the Florida Fifth District Court of Appeal cases of *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992), and *Suggs v. State*, 603 So.2d 6 (Fla. 5th DCA 1992), which the Florida Attorney General contended **procedurally barred MR. ORLEBECK's** Florida claims.

> In *Suggs v. State*, 5th DCA Case No. 91-1641, Opinion filed July 2, 1992, this Court recently addressed the question of how defense cousel should preserve his objection to the composition of the

---

[1]There are five intermediate appellate courts in the State of Florida. The Fifth District Court of Appeal entertains appeals from the Central Florida community, comprised of the Fifth, Seventh, Ninth and Eighteenth Judicial Circuits, comprising the counties of Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, St. Johns, Seminole, Sumter and Volusia. § 35.043, Fla. Stat. (1991).

> jury panel. The Court cited *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992) which suggests that a request for a different panel, a motion for continuance or a motion for mistrial would preserve the issue. The Court said: "It is not sufficient to accept the jury panel and then wait for receipt of an adverse judgment before asserting an objection. In this case as in *Suggs* and *Joiner*, there was [sic] no such motions.

State's answer brief at pages 6-7, a copy of which is attached hereto as **Appendix C.**

Subsequent to oral argument on this appeal, the Florida Fifth District Court of Appeal issued its *per curiam* affirmance on November 24, 1992, without opinion (**Appendix A**).

On January 5, 1993, the Florida Fifth District Court of Appeal denied **MR. ORLEBECK's** Motion for Rehearing and/or Clarification, **MR. ORLEBECK's** Motion for Rehearing En Banc, and **MR. ORLEBECK's** Motion to Certify Questions to the Florida Supreme Court. A copy of the January 5, 1993, order is attached hereto as **Appendix D.**

On January 22, 1993, the Florida Fifth District Court of Appeal issued its mandate. A copy of said mandate is attached hereto as **Appendix E.** On February 8, 1993, Mr. Justice Kennedy denied **MR. ORLEBECK's** Motion to Stay.

MR. ORLEBECK cannot seek relief from the Florida Supreme Court because the issuance of a *per curiam* affirmance by the Florida Fifth District Court of Appeal, without opinion, affirmatively bars this avenue of relief. Fla.R.App.P. 9.030(a)(2), 9.120; *Jenkins v. State*, 395 So.2d 1356, 1359 (Fla. 1980).

MR. ORLEBECK, in accordance with 28 U.S.C. § 1257,

has exhausted all of his Florida appellate remedies and now seeks relief from this Court.

Facts

During the six-person jury selection process in **MR. ORLEBECK's** trial, the State used three of its peremptory challenges to exclude **all** "minority" venire members. The jury was selected from the first seventeen of the eighteen-person panel. Of those seventeen, two were black and one was hispanic. The State **peremptorily struck all three**. Counsel for **MR. ORLEBECK** then made a timely *Batson* objection **prior to the jury being sworn.**

MR.RUSS Let me raise one objection. In this panel, there are, to the best of my recollection, two black members of the venire. That's juror number seven, Mrs. Harris, and juror number nine, Mr. Worrell, both of which were struck by the State. And I don't see any reason as to why they should have been struck in contrast to all the other jurors that accounted. And I raise a challenge that —

COURT Your challenging is untimely, at this point, during this part of the selection for those that have not been struck. I find your objection timely, but what would be the basis of assuming it was other than the only reason they were struck as as far as race?

MR. RUSS I'm not contending that they're struck for a race.

(1/6)

COURT You have to set forth a basis.

MR. RUSS We have a total of 18 venire persons that were called —

COURT Just the facts

MR. RUSS Two that are black by appearance, both of whom were struck by the State. We have one who appears to be of Latin descent, Juror Number One, Gonzalez, struck by the State. I'm raising the **Batts (ph)** case that these people are struck for their race, that — and I don't have to show that there's — I can bring in 20 defense lawyers that would say every time Mr. Bogle picks a jury he strikes all the blacks. (Emphasis added.)

COURT You must at least set forth a basis for believing there are some reasons to believe he is doing that other than the fact those are the numbers. There has to be a prima facie case to establish the motion.

MR. RUSS I don't think that's what **Batts (ph)** would stand for, and that's what the prior cases of the Florida Supreme Court stand for. I may — some in the immediate courts to believe that imperative, but I don't think that's the law. That makes it somewhat ridiculous to say a defense lawyer has to prove a thing. (Emphasis added.)

COURT You have to establish a basis for the challenge beyond the fact that this is what they're doing.

(I/7)

MR. RUSS I'm stating that's [sic] there was absolutely nothing presented in the voir dire of these three struck venire persons, Gonzalez, Harris and

> Worrell, to separate them out from anyone else. As can be struck, peremptorily, there's certainly an inference that this was done, basically, based on race, and not from any other reason.
>
> It would be my motion, legally, that assertion is enough to fall into your lap and into the prosecutor's lap to come forward with to conduct an inquiry, and I request you do conduct an inquiry of the prosecutor as to his reasons for exercising the challenges.

(I/8)

A copy of the pertinent trial record, Volume I, pages 3-10, is attached hereto as **Appendix F**.

Based upon this record, the **trial court** refused to make an inquiry into the prosecutor's reasons underlying the three peremptory challenges; and ruled that **MR. ORLEBECK** did not make a timely objection to the State's peremptory challenges and did not satisfy the "prima facie" initial burden imposed by *Batson*.

> COURT Counsel, I think — whatever — but I could find the objections are not timely. The defense has not made a showing sufficient to require this Court to inquire. State will consider that proffer for this reason.

Record on Appeal, Volume I, page 9, **Appendix F.**

* * *

At the oral argument before the Florida Fifth District Court of Appeal, a member of the Court inquired of **MR. ORLEBECK's** lawyer whether he had taken the **additional**

affirmative steps of moving to strike the venire and/or moving for a continuance subsequent to the trial court's denial of the lawyer's *Batson* objection, apparently referring to *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992), and *Suggs v. State*, 603 So.2d 6 (Fla. 5th DCA 1992).[2] *Joiner* and *Suggs* were decided by the Fifth District **ten and sixteen months after MR. ORLEBECK's trial**, respectively.

MR. ORLEBECK claims, as reflected in Reasons for Granting the Writ, *infra*, that the Florida Fifth District Court's decision conflicts with this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991).

REASONS FOR GRANTING THE WRIT

1. Introduction/ Florida Appellate Court's Decision Conflicts with *Batson v. Kentucky* and *Ford v. Georgia*

Pursuant to Sup. Ct. R. 10.1(c), certiorari will lie with this Court if the Florida Fifth District Court of Appeal decision — in this case, the state court of last resort — conflicts with this Court's decisions in *Batson v .Kentucky, supra*, and *Ford v. Georgia, supra*.

> (c) When a state court or a United States court of appeals has decided an important question of federal

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[2]It should be noted that none of the other four Florida district courts of appeal have followed the holding in *Joiner* and *Suggs*, and at least one court has specifically held to the contrary, *Law v. State*, 610 So.2d 59 (Fla. 3d DCA 1992). Moreover, the Florida Supreme Court accepted jurisdiction over *Joiner*, Case No. 79,567. *Joiner v. State*, 604 So.2d 487 (Fla. 1992). The Florida Supreme Court also accepted jurisdiction over *Suggs* in an order dated December 23, 1992, Case No. 80,529.

> law which has not been, but should be, settled by this Court, **or has decided a federal question in a way that conflicts with applicable decisions of this Court.** (Emphasis added.)

Sup. Ct. R. 10.1(c). The three decisions of the Florida Fifth District Court of Appeal in *Orlebeck v. State, Joiner v. State,* 593 So.2d 554 (Fla. 5th DCA 1992), and *Suggs v. State,* 603 So.2d 6 (Fla. 5th DCA 1992),[3] have added substantive and procedural burdens to this Court's decision in *Batson,* which a defendant in Central Florida trial courts must now satisfy in order to obtain appellate review in Florida.

* * *

In *Joiner,* the appellant was tried and convicted for possessing a controlled substance and resisting arrest without violence. During voir dire, the prosecution struck two black veniremen. Subsequent to the use of these peremptory challenges by the State, the defense voiced a *Batson/Neil* objection.[4] The trial court, finding that the defendant's objection was timely, conducted a *Batson* inquiry, subsequently finding that the State's peremptory challenges were lawful. Mr. Joiner, subsequent to conviction, sought appellate relief in the Florida Fifth District

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[3]However, the Florida Supreme Court held on February 18, 1993, that once a *Neil/Batson* objection is made, the trial court **must** conduct an inquiry. The proper remedy where the trial court fails to do so "is to reverse and remand for a new trial." *State v. Johans,* ____ So.2d ____, (18 Fla. L. Weekly S124, Fla. 2/18/93). Even prior to the *Johans* opinion, it was well established under Florida law that, based upon the facts in **MR. ORELBECK's** case, reversible error occurred. *Hall v. Daee,* 602 So.2d 512, 516 (Fla. 1992); *Reynolds v. State,* 576 So.2d 1300 (Fla. 1991); *Blackshear v. State,* 521 So2d 1083, 1084 (Fla. 1988); *State v. Slappy,* 522 So.2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

[4]*State v. Neil,* 457 So.2d 481 (Fla. 1984).

Court of Appeal. The Florida Fifth District Court of Appeal although finding that a proper *Batson* objection was timely raised, held that Mr. Joiner did not satisfy *Batson's* requirements to perfect his record on appeal because, subsequent to the trial court's overruling of his *Batson* objection, he did not move to strike the venire panel, move for a mistrial, or move for a continuance. 593 So.2d at 556. The Florida Fifth District Court of Appeal reiterated this position in *Suggs v. State, Supra.* It is important to note that the *Joiner* decision was decided approximately **ten months after MR. ORLEBACK's** trial and *Suggs,* following *Joiner,* was decided some **sixteen months** subsequent to **MR. ORLEBECK's** trial.

Since the *Orlebeck* decision affirming the trial court's demand for an additional "basis" and "showing" (**Appendix F,** pages 6-9) creates and places an additional **substantive** burden on the defendant not required by *Batson,* this Court should grant **MR. ORLEBECK's** petition. Since *Joiner* and *Suggs* also create and additional **procedural** burden which is inadequate to serve as an independent state ground,[5] this Court should grant **MR. ORLEBECK's** petition for writ of certiorari because the **retroactive application** of the *Joiner* and *Suggs* procedural burden is prohibited by *Ford v. Georgia,* 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). The Florida Fifth District Court of Appeal decisions conflict with prior decisions of this Court.

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[5]*Michigan v. Long,* 463 U.S. 1032, 103. S.Ct. 3469, 77 L.Ed.2d 1201 (1983); Annot., *What Constitutes Adequate and Independent State Substantive Ground Precluding Supreme Court Review of State Court Decision on Federal Question,* 59 L.Ed.2d 924 (1990).

2. *Batson v. Kentucky* — Defendant's Initial Burden/Prima Facie Showing and Timeliness of Objection.

The trial court in **MR. ORLEBECK's** case held that **MR. ORLEBECK** did not make a timely and prima facie showing of discrimination as required by *Batson* and its progeny. This ruling conflicts with prior decisions of this court.

Under *Batson* and its progeny, in order to meet his initial burden a defendant must show the following:

1. he must show that the State is exercising its peremptory challenges on the basis of race, *i.e.*, against a cognizable racial group. *Batson*, 106 S.Ct. at 1723; *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991);

2. he must show that the State has exercised its peremptory challenges "to remove from the venire members of the defendant's race." *Batson*, 106 S.Ct. at 1723[6]; and

3. he must show, from the facts which come to light during the voir dire examination, "[a]nd any other relevant circumstances . . . ." that there is an inference that the prosecution is excluding veniremen on the basis of their face. *Batson*, 106 S.Ct. at 1723; *Hernandez*, 111 S.Ct. at 1866.

A defendant establishes this requisite showing by directing the trial court's attention to a pattern of peremptory strikes

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[6]Although James Kirkland Batson was a black man, this Court in *Powers v. Ohio*, 499 U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), held that a white man has standing to object to the state's illegal peremptory challenges of "minority venire members."

against minority veniremen by the prosecutor (followed by a motion for a judicial inquiry), as was done in **MR. ORLEBECK's** case. See **Appendix F.** *Batson,* 106 S.Ct. at 1723; *Edmonson v. Leesville Concrete Co.,* ____ U.S. ____, 111 S.Ct. 2077, 2081, 2088, 114 L.Ed.2d 660 (1991). Once the defendant satisfies this initial burden, the burden then shifts to the State to explain, based upon the factual record before the trial court, that its peremptory strikes were exercised in a race-neutral manner. *Batson,* 106 S.Ct. at 1723. The trial court then, as a fact finder, must make a factual determination whether the defendant has "established purposeful discrimination." *Batson,* 106 S.Ct. at 1734; *Hernandez,* 111 S.Ct. at 1868. *See also Trevino v. Texas,* ____ U.S. ____, 112 S.Ct. 1547, 118 L.Ed.2d 193 (1992), for a discussion of this appellate preservation issue.

This Court has repeatedly held that a timely **objection** preserves this issue for appeal.

> In this case, petitioner made a **timely objection** to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. (Emphasis added.)

Batson, 106 S.Ct. at 1725. The facts in **MR. ORLEBECK's** case are close to the facts in *Batson.* In *Batson* the prosecution struck all four black persons on the venire, after which defense counsel moved to discharge the jury before it was sworn, arguing that the prosecution's peremptory strikes violated Mr. Batson's constitutional rights as guaranteed by the Fourteenth Amendment's guarantee to equal protection under the laws. This is virtually the same scenario which occurred in **MR. ORLEBECK's** case, where counsel for **MR. ORLEBECK** objected, and moved for a *Batson* inquiry, after

the State struck the only three minority members on the venire. *See* **Appendix F**, pages 6-9.

At no time has this Court stated that a defendant must do more — *i.e.*, make an additional "basis" or "showing" — to fulfill his initial "prima facie" burden under *Batson*. Further, a defendant — in the absence of this requested judicial inquiry and determination — is not required to also move to strike the venire panel, move for a continuance, or move for a mistrial.

3. *Joiner* and *Suggs* — Illegal Substantive Requirement and Illegal Retroactive Procedural Hurdle/*Ford v. Georgia*

The Florida Fifth District Court of Appeal, by affirming the trial court in *Orlebeck*, and deciding *Joiner, supra*, and *Suggs, supra*, has attached additional substantive and procedural requirements to the defendant's burden in preserving a *Batson* claim for appellate review. The Florida Fifth District Court of Appeal cannot create new substantive and procedural requirements which abridge, not only this Court's prior rulings, but the defendant's **equal protection** rights protected by the Fifth and Fourteenth Amendments, United States Consitution.

A case on point is *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991. James A. Ford, a black man, was charged with murdering a white woman. Trial counsel on behalf of Mr. Ford filed a pretrial motion objecting to any potential racially-motivated use of the State's peremptory challenges. Mr. Ford's pretrial motion was denied by the Georgia trial court. It appears from the *Ford* record that counsel for Mr. Ford **did not object** to the State's illegal and discriminatory use of its peremptory strikes during the jury selection process. To the contrary, **on the second day of Mr. Ford's trial**, the trial court held an in chambers conference wherein Mr. Ford's pretrial motion was discussed.

At this time, the trial court noted that the State exercised nine of its ten challenges to strike black veniremen and reiterated that Mr. Ford's "motion" was denied. Mr. Ford was convicted and sentenced to die. After exhausting his state appellate review process, Mr. Ford sought relief from this Court.

This court granted the first petition for certiorari, vacated the judgment, and remanded to the Supreme Court of Georgia. *Ford v. Georgia,* 479 U.S.1075, 107 S.Ct. 1268, 94 L.Ed.2d 129 (1987). On remand, the Georgia Supreme Court held that Mr. Ford's claim was **procedurally barred** based upon *State v. Sparks,* 257 Ga.97, 355 S.E.2d 658, 659 (1987), which held that the defendant must object and raise his claim ". . . prior to the time the jurors selected to try the case are sworn." *Ford,* 111 S.Ct. at 854, quoting *State v. Sparks,* 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987).[7] In the second certiorari proceeding, this Court ruled that its holding in *Batson* applied in Mr. Ford's case since he presented an equal protection claim to the trial court. *Ford,* 111 S.Ct. at 855-56.

Justice Souter, in delivering the opinion of this Court, stated that the *Sparks* rule was "inadequate to serve as an independent state ground . . ." because *Sparks* was decided more than two years after Mr. Ford filed his equal protection motion in that court. *Ford,* 111 S.Ct. at 857-58.

> To apply *Sparks* **retroactively** to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule **unannounced** at the time of petitioner's trial and conse-

[7]It is pertinent to note that the rule announced by the Supreme Court of Georgia [*Ford,* 111 S.Ct. at 586] has been the rule in the State of Florida since 1984, and was met in **Mr. Orlebeck's** case (see **Appendix F**). *See State v. Neil,* 457 So.2d 481 (Fla. 1984).

> quently inadequate to serve as an independent state ground within the meaning of *James*. (Emphasis added.)
>
> * * *
>
> The *Sparks* rule, **adopted long after petitioner's trial**, cannot bar federal judicial review of petitioner's equal protection claim. The judgment below is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. (Emphasis added.)

Ford, 111 S.Ct. at 858.

The Florida Fifth District Court of Appeal acted contrary to this Court's ruling in *Ford* by retroactively holding **MR. ORLEBECK** to the requirements of *Joiner* and *Suggs*, since these cases were decided some **ten and sixteen months**, respectively, after **MR. ORLEBECK's** trial. *See also* Ex Post Facto Clauses, Article I, Sections 9[3] and 10[1], United States Constitution.

CONCLUSION

Based upon the arguments and authorities cited herein, **MR. ORLEBECK's** Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

JOHN PHILLIPS ORLEBECK,
Appellant,

v.

CASE NO: 91-2377

STATE OF FLORIDA,
Appellee.

Decision filed November 24, 1992

Appeal from the Circuit Court
for Orange County,
Gary L. Formet, Sr., Judge.

James M. Russ and Steven G. Mason of Law Offices of James M. Russ, P.A., Orlando, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach for Appellee.

PER CURIAM

AFFIRMED.

COBB, PETERSON and DIAMANTIS, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA
CASE NO. CR 90-11322 DIVISION 14

FILED IN OPEN COURT
THE 27 DAY OF MARCH, 1991
Fran Carlton, Clerk
BY/s/P. Riggall D.C.

STATE OF FLORIDA

-vs-

JOHN PHILLIPS ORLEBECK
Defendant

JUDGMENT

The Defendant, John Phillips Orlebeck, being personally before this Court represented by J. Russ, his attorney of record, and having:

☑ Been tried and found guilty of the following crime(s)

* * *

COUNT	CRIME	OFFENSE STATUTE NO(S	CRIME DEGREE
Ct.1	Possession of Cannabis	893.13(1)(f)	F3
	A Controlled Substance	893.03(1)(c)	

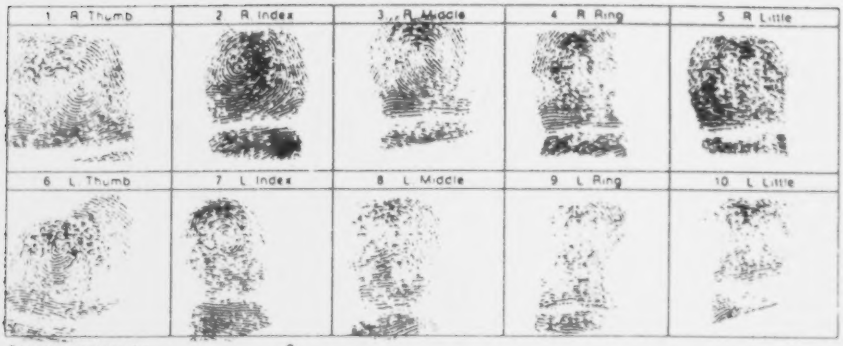
* * *

DONE AND ADJUDGED in Open Court at Orlando, Orange County, Florida, this the 27 Day of March, 1991, pursuant to Rule 3.670.

_____

Judge

FINGERPRINTS OF DEFENDANT



Fingerprints taken by

DCSO-DGJL Taylor #007 27 MAR 1991 1800HRS

Name and Title

DONE AND ORDERED in Open Court at Orlando, Orange County, Florida, this 27 day of March, 1991. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, John Phillips Orlebeck and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/ Gary L. Formet, Sr.

Judge

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY That the above and foregoing is a true copy of the original filed in this cause.

FRAN CARLTON, Clerk Circuit Court

Dated 3-28-91 By Nancy Duncan D.C.

IN THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA
CASE CR90-11322 DIVISION 14

____Court Minutes__X__ Order (Plea/Sentencing/Release)

STATE OF FLORIDA
VS
JOHN PHILIP [sic] ORLEBECK
Charged with: Possession of Cannabis, a controlled substance F3
Court opened at 9:30 AM on 10/24/91 Honorable Gary L. Formet, Sr., Judge.
Assistant State Attorney R. Bogle, Court Reporter, R. Meyer, Court Deputy, R. Dowd.

This Case came on this date for Plea.

The Defendant was present with Counsel J. Russ.

* * *

__Defendant adjudged guilty. ✓ $5.00 C.C. ✓ $20.00 C.C.F. ✓ $200.00 C.J.T.F. (27.3455) or __ $50.00 C.J.T.F.
SENTENCE: PREVIOUSLY ADJ. GUILTY. 3 yrs Prob. w/conds. 1.) 100.00 to FDLE & $1,000.00 to O/C DTF to be paid to Clerk of Court 2) Complete outpatient counseling recommended 3) No Drugs or alcohol 4.) 75 hrs. of Community Service thru Volunteer Service Bureau 5) After 1 1/2 yrs & all conds are met Court will terminate

* * *

DONE and ORDERED this 24 day of October, 1991.

GLF
Circuit Judge

Filed in Open Court this 24 day of October, 1991.
Fran Carlton, Clerk of the Circuit/County Courts.
by: /s/ R. Rizzall, Depty Clerk in attendance
Distribution: Defendant; Probation/Parole
Court Recessed at ____ on 10/24/91

APPENDIX C

IN THE DISTRICK COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JOHN PHILLIPS ORLEBECK,
Appellant,
v. CASE NO. 91-2377
STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee would add that Agent Porro testified that Appellant "took possession of the package from me." (R55). He said that the box indicated that it contained a laser disc and that there was some conversation about that. Appellant twice stuck his hand down into the box, felt around and said: "Yeah, everything's fine." "It's all fine." (R58). The tape of their conversation was admitted into evidence as State's Exhibit #8. It indicates that Porro said he was afraid the laser disc might have been chewed up. Appellant felt around in the box and indicated that it was all fine. (R362-363).

SUMMARY OF ARGUMENT

The evidence was more than adequate to submit to the jury the issue of whether Appellant knowingly possessed marijuana.

The prosecutor gave valid racially neutral reasons for his use of peremptory challenges to strike two prospective black jurors.

The trial court properly instructed the jury on possession of marijuana and properly refused to give inappropriate or incorrect special instructions requested by the defense.

Appelant was not the victim of objective entrapment, even assuming that that doctrine is still viable under Florida law. He was also not the victim of any federal due process violations.

The prosecutor's closing argument was fair and nothing he said was so egregious as to require the drastic remedy of a mistrial.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF AQUITTAL ON THE GROUNDS THAT THE STATE FAILED TO PROVE APPELLANT'S KNOWLEDGE THAT THE SUBSTANCE HE POSSESSED WAS MARIJUANA.

In *Lynch v. State*, 293 So.2d 44, 45 (Fla. 1974), the Florida Supreme Court set forth the standard for rulings on motions for judgment of acquittal:

> A defendant, in moving for judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge.

In *State v. Law*, 559 So.2d 187 (Fla. 1989), the Florida Supreme Court reaffirmed its holding in *Lynch* and said:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State,* 313 So.2d 666, 670 (Fla. 1975), cert denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See *Toole v. State,* 472 So.2d 1174 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. *Bedford v. State,* 589 So.2d 245, 250 (Fla 1991), citing *Holton v. State,* 573 So.2d 284, 289 (Fla. 1990), cert. denied ____ U.S. ____, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991) and *Cochran v. State,* 547 So.2d 928, 930 (Fla. 1989).

Appellant's basic assertion is that the State failed to establish that he knew the parcel that was delivered to him contained marijuana. The State argued that the manner in which Appellant checked the contents of the box in the presence of agent Porro by twice reaching in and feeling the packages of marijuana establish that he knew what he was receiving and it wasn't a laser disc. Appellant asserts that, in order to establish that a defendant knows that a package of leafy material in his possession is an illegal substance such as marijuana, the State must prove that the defendant had done

a complete analysis of the substance with a microscope as well as thorough chemical analysis. If that were in fact the standard for a trial court's ruling on a motion for judgment of acquittal, there would never be a conviction for possession of marijuana. But that is not the standard for fuling on a motion for judgment of acquittal. There must have been some evidence from which the jury could infer that Appellant knew what he was receiving. It could be inferred from his examination of the "laser disc" that he had the requisite guilty knowledge. As stated earlier, where there is room for differences of opinion as to the inferences to be drawn from the evidence adduced, the court should deny the motion for judgment of acquittal. Whether reasonable hypotheses of innocence have been excluded is a jury question. *Taylor v. State*, 583 So.2d 323, 328-329 (Fla. 1991).

Appellant also contends that the State failed to establish that he had exercised dominion and control over the box containing the marijuana. Agent Porro delivered the box to Appellant. Appellant physically took the package from Porro. After examining the contents, Appellant signed a receipt saying: "Received in good order, John Orlebeck." (R55-58). This evidence was sufficient to submit this issue to the trier of fact for its determination.

POINT II

THE TRIAL COURT DID NOT ERR IN ITS HANDLING OF DEFENSE COUNSEL'S UNTIMELY OBJECTION TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO STRIKE MINORITY MEMBERS OF THE VENIRE.

After all the peremptory challenges had been used and a jury selected, defense counsel said that he would like to raise an objection. He stated that juror number seven and nine, Ms. Harris and Mr. Worrell, were the only two black members of the venire and both were stricken by the State. He then said: "I'm not contending that they're struck for a race." (R6). However, immediately thereafter, he said that juror number one was Spanish and was stricken by the State and that all of these people were stricken because of their race. (R7). Defense counsel then requested that the court inquire of the prosecutor his reasons for exercising the challenges. (R8). The prosecutor stated that he struck Ms. Harris because her son was in prison and he never puts anyone on a jury who has children who have been arrested and placed in prison by a jury. He said that Mr. Worrell gave a noncommital response to his question about the legalization of marijuana. A juror's opinion on that issue could be crucial in a marijuana possession prosecution such as the instant case. (R9).

In *Suggs v. State*, 5th DCA Case No. 91-1641, Opinion filed July 2, 1992, this Court recently addressed the question of how defense counsel should preserve his objection to the composition of the jury panel. The Court cited *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992) which suggests that a request for a different panel, a motion for continuance or a motion for mistrial would preserve the issue. The Court said: "It is not

sufficient to accept the jury panel and then wait for receipt of an adverse judgment before asserting an objection. In this case as in *Suggs* and *Joiner*, there was no such motions. In any event, the reasons given by the prosecutor for striking the two black venire members were both valid and racially neutral and met the requirement of *State v. Slappy*, 522 So.2d 18 (Fla.), cert. denied 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) and *State v. Neil*, 457 So.2d 481 (Fla. 1984).

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR SPECIAL JURY INSTRUCTIONS ON TEMPORARY POSSESSION.

Appellant requested a special jury instruction on the temporary handling of a parcel containing marijuana "prior to the completion of a contemplated delivery. (R650). He also requested a special instruction that the fact that he was the named addressee on a parcel does not establish that he knew it contained marijuana. .(R651). In support of these special instructions, Appellant relies primarily on *Campbell v. State*, 577 So.2d 932 (Fla. 1991), a case in which the accused was buying cocaine from an undercover police officer. The bag of cocaine Campbell was to purchase was placed on his lap in the back of the undercover officers' car for his inspection. After examining it to his satisfaction, Campbell exited the vehicle leaving the bag on the back seat. The Supreme Court concluded that, since there was evidence that Campbell possessed the cocaine only temporarily for the sole purpose of testing it and that he never had dominion or control over it, the trial court should have instructed the jury, pursuant to *Garces v. State*, 485 So.2d 847, 848 (Fla. 3d DCA 1986), that tempo-

rary possession of a narcotic for the purposes of testing its quality prior to the consummation of the transaction does not constitute legal possession.

In the instant case, Appellant was not being asked to test the quality of the marijuana prior to purchasing it from an undercover agent. The marijuana purchase had apparently already been made. The police simply interrupted its delivery to Appellant by Federal Express. When they did deliver it to him, he inspected it and signed for it and took dominion and control over the package of contraband which had been mailed to him from California. A jury instruction on temporary possession to inspect the quality of the merchandise prior to a drug purchase was not appropriate under the facts of this case and the trial court properly refused to give such an instruction. Likewise, a special instruction on the inferences to be drawn from the fact that Appellant was the addressee on the parcel was not necessary. The standard instructions as given were adequate. (R407-419)

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS BASED UPON HIS ASSERTION THAT HE WAS ENTRAPPED.

Appellant is asserting objective entrapmentunder the two-prong test of *Cruz v. State*, 465 So.2d 516 (Fla. 1985), cert. denied 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). Under that test, the State must show that the police were attempting to interrupt a specific, ongoing criminal activity and that they used means reasonably tailored to apprehend those involved in it. In the instant case, some marijuana was sent to Appellant from California via Federal Express (a specific

ongoing criminal activity). The police intercepted the parcel and, when they delivered it to Appellant and when he examined its contents and signed for it, they arrested him (means reasonably tailored to apprehend him). Clearly, the police conduct in this case was not "so egregious as to constitute entrapment as a matter of law". The question tht the State would ask is: what could the police have done when they detected the contraband being shipped to Appellant which would have been more reasonable?

It should be noted that the debate is still raging over whether the two-prong test for objective entrapment set forth in *Cruz* is still the law in Florida. The State would assert that objective entrapment has been legislatively abolished. However, even under a federal due process test, the conduct of the police in this case cannot be said to have been "outrageous". See *Gonzalez v. State*, 571 So.2d 1346, 1349-1350 (Fla. 3d DCA 1990.)

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON ALLEGEDLY IMPROPER PROSECUTORIAL CLOSING ARGUMENT.

At the end of the prosecutor's closing argument, defense counsel moved for a mistrial claiming that the prosecutor had commented upon Appellant's not taking the witness stand by arguing that there was no evidence presented that he did not know what was in the box. The trial court denied the motion without elaboration. (R364).

The prosecutor simply said that: "There isn't anything to contradict that." (That he knew what was in the parcel). "Clearly he had possession of it, and only reasonable con-

clusion is that he knew what was in it." (R363-364). Neither of these remarks constituted a comment on Appellant's exercise of his right not to testify. However, the defense did present a parade of witnesses and exhibits all of which were designed to obscure the real issue: whether Appellant knowingly possessed the marijuana. It was fair for the prosecutor to comment on this smoke screen. A reading of the prosecutor's closing argument in its entirety fails to demonstrate any intentional misconduct. (R352-364, 397-407). The prosecutor made a point of emphasizing that:

> Everything that I say to you is what the State believes the evidence has shown. I'm not giving my personal opinion. I'm commenting on the evidence. I don't want you to take it any other way. (R361).

Even if any of the prosecutor's remarks could possibly be construed to have been somehow technically improper, such comments are subject to the harmless error analysis of *State v. DiGuilio*, 492 So.2d 1129, 1135 (Fla. 1986). See *Singletary v. State*, 483 So.2d 8, 10 (Fla. 2d DCA 1985). Given a careful reading of the prosecutor's entire closing argument, especially taken in light of the defense case and the closing argument of defense counsel, it cannot be said that the specific remarks in question affected the outcome of this trial.

The determination of whether substantial justice warrants granting a mistrial is within the discretion of the trial court. *Solomon v. State*, 17 FLW D911 (Fla. 3d DCA Opinion filed April 7, 992), citing *Sireci v. State*, 587 So.2d 450 (Fla. 1991) and *Dufour v. State*, 495 So.2d 154 (Fla. 1986), cert. denied 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 1987). It should be granted only in circumstances where the error was so prejudicial as to vitiate the entire trial. *Duest v. State*, 462 So.2d 446 (Fla. 1985). In *Breedlove v. State*, 413 So.2d 1,7

(Fla. 1982), the Court said that instruction to a jury to ignore an improper remark can cure the harm. "If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared."

POINT VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE ELEMENT OF KNOWLEDGE OF THE ILLICIT NATURE OF THE SUBSTANCE HE POSSESSED.

After jury selection, the trail court stated that it would give the standard opening jury instructions. Defense counsel requested that his special jury instructions one through four, discussed above in argument on Point III, be given as preliminary instructions. The trial court denied that request, but said that it would reconsider them "when they come into play" after the evidence is received. (R10-13). As pointed out previously in argument on Point III, some portions of the requested special instructions are inapplicable to the facts of this case and, as Appellant concedes, the trial court did instruct the jury at the close of all the evidence that it must have been proven that the accused had knowledge of the illicit nature of the substance. (R339, 349, 408). Nothing in this record indicates as Appellant claims that "the jury was essentially instructed to disregard the evidentiary emphasis on this fourth element of the crime." Defense counsel placed more than adequate emphasis on this element during his closing argument. The jury simply found the State's evidence on this element sufficient.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/Anthony J. Golden
ANTHONY J. GOLDEN
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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished to James M. Russ, Esquire, Law Offices of James M. Russ, P.A., and Steven G. Mason, Esquire, Law Offices of Steven G. Mason, Counsel for Appellant, The Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this 9th day of July, 1992.

/s/ Anthony J. Golden
Anthony J. Golden
Assistant Attorney General

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JOHN PHILLIPS ORLEBECK,
Appellant,

v. Case No. 91-2377

STATE OF FLORIDA,
Appellee.
_____/

DATE: January 5, 1993

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING AND/OR CLARIFICATION, Appellant's MOTION FOR REHEARING EN BANC, and Appellant's MOTION TO CERTIFY QUESTIONS OF LAW TO THE FLORIDA SUPREME COURT, filed December 9, 1992, are denied.

I hereby certify tht the foregoing is
(a true copy of) the original court order.
/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK,

BY: _____

(COURT SEAL)

cc: James M. Russ, Esq.
Office of the Attorney General, Daytona Beach

APPENDIX E

MANDATE

FROM

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Gilbert S. Goshorn, Jr. Chief Judge of the District Court of Appeal of the State of Florida, Fifth District, and the seal of the said Court at Daytona Beach, Florida on this day.

Date: January 22, 1993

Fifth DCA Case No. 91-2377 [SEAL]
County of Origin: Orange
Trial Court Case No. CR90-11322

/s/ Frank J. Habershaw
Frank J. Habershaw
Clerk

APPENDIX F

IN THE CIRCUIT COURT,
9TH JUDICIAL CIRCUIT,
CRIMINAL JUSTICE DIVISION
IN AND FOR ORANGE COUNT, FLORIDA

STATE OF FLORIDA,
PLAINTIFF,

VS. CASE NO. CR 90-11322
VOLUME I

JOHN PHILLIPS ORLEBECK,
DEFENDANT.
_____/

TRIAL PROCEEDINGS
BEFORE
THE HONORABLE GARY L. FORMET, SR.

ORANGE COUNTY COURTHOUSE
COURTROOM J, SECOND FLOOR
ORLANDO, FLORIDA 32801
MARCH 25, 26, 1991

A P P E A R A N C E S:

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APPEARING FOR THE DEFENDANT

[3] PROCEEDINGS

March 25, 1991

(Voir Dire was had by respective counsel, and not requested to be transcribed at this time).

(Court reconvened at 4:10 p.m., and the following proceedings were had).

THE COURT: All right. We're ready to select the jury?

MR. RUSS: I am.

THE COURT: State?

MR. BOGLE: Yes, sir.

THE COURT: Let's bring the jury in. Any challenges for cause on behalf of the state?

MR. BOGLE: No, not really.

THE COURT: Any challenges for cause?

MR. RUSS: No, Your Honor.

THE COURT: State, any objection to jurors one through six?

MR. BOGLE: 109.

THE COURT: He objected to juror number 109.

MR. BOGLE: Number two.

THE COURT: Any objection from the defense to jurors one, three, four, five, seven, eight?

MR. RUSS: I will strike juror number six, Mr. Grimes.

[4] THE COURT: Any objection from the state to jurors one, three, four, five, seven, eight?

MR. BOGLE: Juror number seven.

THE COURT: Any objections from the defense to jurors one, three, four, five, eight, nine?

MR. RUSS: I will strike number four, Your Honor.

THE COURT: Okay.

THE COURT: Any objections from the state to jurors one, three, five, eight, nine, ten?

MR. BOGLE: Strike number nine.

THE COURT: Any objections from the defense to jurors one, three, five, eight, ten, eleven?

MR. RUSS: Strike number 10, Judge.

THE COURT: Any objections from the state to jurors one, three, five, eight, 11, 12?

MR. BOGLE: No, Your Honor.

THE COURT: Any objections from the defense to jurors one, three, five, seven, eight, 11, 12?

MR. BOGLE: No challenges by the state.

MR. RUSS: I'll strike number 11, Judge.

THE COURT: Any objections from the state to jurors 1, 3, 5, 11, 15?

MR. BOGLE: I'm going to go ahead and strike number one.

THE COURT: You each have two peremptory challenges [5] left. Three, five, eight, 12, 13, and 15.

MR. RUSS: I will strike number 14.

THE COURT: Defense. Any objections from the state to

three, five, eight, 12, 13, 15?

MR. BOGLE: I will strike number 15.

THE COURT: Has one peremptory challenge. Any objection?

MR. RUSS: Wait a minute.

THE COURT: Three, five, eight, 12, 13, 16.

MR. RUSS: I've got one peremptory challenge left? We challenge — I'll pass.

THE COURT: State; three, five, eight, 12, 13, 16?

MR. BOGLE: I will pass.

THE COURT: Last challenge for the defense. Three, eight, 12, 13, 15.

MR. RUSS: I'll strike number five.

THE COURT Counsel have exhausted their peremptory challenges. Any objections to three, eight, 12, 13, 16, 17?

MR. BOGLE I will accept them.

THE COURT: Any challenges for cause from the defense to jurors three, eight, 12, 13, 16, 17?

MR. RUSS: I have no challenges for cause.

THE COURT: No peremptory challenges?

MR. RUSS: I'm on the peremptories. I don't have no **[6]** challenges for cause.

THE COURT: Juror number 3,8, 12, 13, 16, 17. Any objections from the state to juror 18 as our alternate?

MR. BOGLE: Yes, strike number 18.

THE COURT: Then we'll go forward without an alternate juror, and hope everybody comes back.

MR. BOGLE: I — you want to try to stipulate to one of the one's we've stricken? Maybe number four or five.

MR. RUSS: I'm not interested.

THE COURT: Okay.

MR. RUSS: Let me raise one objection. In this panel, there are, to the best of my recollection, two black members of the venire. That's juror number seven, Mrs. Harris, and juror number nine, Mr. Worrell, both of which were struck by the state. And I don't see any reason as to why they should have been struck in contrast to all the other jurors that accounted. And I raise a challenge that —

THE COURT: Your challenging is untimely, at this point, during this part of the selection for those that have not been struck. I find your objection timely, but what would be the basis of assuming it was other than the only reason they were struck was as far as race?

MR. RUSS: I'm not contending that they're struck for a race.

[7] THE COURT: You have to set forth a basis.

MR. RUSS: We have a total of 18 venire persons that were called —

THE COURT Just the facts.

MR. RUSS: Two that are black by appearance, both of whom were struck by the state. We have one who appears to be of Latin descent, juror number one, Gonzalez, struck by the state. I'm raising the Batts (PH) case that these people are struck for their race, that — and I don't have to show

that there's — I can bring in 20 defense lawyers that would say every time Mr. Bogle picks a jury he strikes all the blacks.

THE COURT: You must at least set forth a basis for beliving there are some reasons to believe he is doing that other than the fact those are the numbers. There has to be a prima facie case to establish the motion.

MR. RUSS: I don't think that's what Batts (PH.) would stand for, and that's what the prior cases of the Florida Supreme Court stand for. I may — some in the immediate courts to believe that imperative, but I don't think that's the law. That makes it somewhat ridiculous to say a defense lawyer has to prove a thing.

THE COURT: You have to establish a basis for the challenge beyond the fact that this is what they're doing.

[8] MR. RUSS: I'm stating that's there was absolutely nothing presented in the voir dire of these three struck venire persons, Gonzalez, Harris and Worrell, to separate them out from anyone else. As can be struck, peremptorily, there's certainly an inference that this was done, basically, based on race, and not from any other reason.

It would be my motion, legally, that assertion is enough to fall into your lap and into the prosecutor's lap to come forward with to conduct an inquiry, and I request you do conduct an inquiry of the prosecutor as to his reasons for exercising the challenges.

THE COURT: Would the prosecutor like to respond to it?

MR, BOGLE: Yes, I would, Your Honor. Number one, I'd ask the Court to make a finding based upon the number of cases I have done in front of Your Honor. I have never stricken a juror based upon a racial basis.

THE COURT: I could not find that. I don't have statistics.

MR. BOGLE: The four cases I've tried, there's been no basis at all.

THE COURT: None come to mind, but I'm not sure I could make that finding of fact.

MR. BOGLE: There's not a prima facie case. Just so [9] the record is clear, the reason for striking Ms. Harris, her son is in prison, and still in prison, today. And I make it a rule of thumb not to put anyone whose children have been arrested and placed in prison on a jury. Mr. Worrell was very non-commital as to the legalization of marijuana.

He thought, "Well, I don't really have an opinion." And also most important is you could not understand him at all. And I know that's not going to come out real clear in the record. The Court probably couldn't understand what he was saying. I kept trying to repeat things. I know Mr. Russ couldn't understand him. The very first question I asked him was when he was a juror, and he explained it was last year, and I had no idea what he was saying. He was saying it for the fifth time.

THE COURT: Counsel, I think — whatever — but I could find the objections are not timely. The defense has not made a showing sufficient to require this court to inquire. State will consider that proffer for this reason.

MR. RUSS: I'd like the record to reflect it relates to the questioning of Mr. Worrell. The record should reflect at the time the questioning was done by the prosecutor that the prosecutor and the lectern were quite [10] close to Mr. Worrell, and counsel for the defense and the court were a significant distance away from both the prosecutor and Mr. Worrell. Whereas, when Mr. Worrell was questioned by defense counsel the lectern had been moved. That was in a position

where the court as well as the defense can hear his answers.

THE COURT: All right. Let me just, briefly, go over the opening instructions. I intend to give pre-trial instructions 101 (A). I will give — you want to grab the jury instructions. Opening. I intend to give 101, pre-trial instructions; defendant's right to remain silent, and the drug abuse possession of cocaine, standard jury instructions that I presented to you with the definition of possession.

I will give 203, plea of not guilty. Reasonable doubt, burden of proof. 204, weighng the evidence, the first five paragraphs, only.

The standard opening jury instructions that I'll give. Upon closing, I will repeat any specials that I have, and repeat 203, and I will repeat 204, the first five paragraphs. Additional paragraphs that come into play based on the evidence in the opening instructions. I will give the first five.

MR. RUSS: You are talking now about 204?

THE COURT: 204, the first five paragraphs, only.

92-1609

No. _____

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1992

JOHN PHILLIPS ORLEBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED—RESTATED

1. Whether the affirmance of a conviction without a written opinion by a state appellate court in an appeal containing a *Batson* issue constitutes a "special and important reason" for this Court to exercise its discretionary jurisdiction, especially in light of the fact that it is not clear whether the State court's affirmance of Petitioner's conviction and sentence was based on a procedural bar or on the issue's lack of merit?

2. Whether the Florida courts have implemented additional substantive and procedural hurdles a defendant must overcome in order to obtain appellate review of a *Batson* claim in Florida?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

Respondent, the State of Florida, respectfully prays this Court decline to issue a writ of certiorari to review the decision of the Florida District Court of Appeal, Fifth District, in this cause.

OPINION BELOW

The decision of the Florida Fifth District Court of Appeal is reported as *Orlebeck v. State,* 611 So. 2d 534 (Fla. 5th DCA 1993).

JURISDICTION

Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. Section 1257(a). However, the per curiam affirmance of Petitioner's conviction and sentence without opinion by the Fifth District Court of Appeal of the State of Florida does not draw into question the validity of any United States treaty or statute, the constitutionality of any Florida state statute or any title, right, privilege or immunity specially set up or claimed under them.

Likewise, under U.S. Sup. Ct. Rule 10.1(b) and (c), the per curiam affirmance by the Fifth District Court of Appeal of the State of Florida in this case did not decide any federal question in a way that conflicts with applicable decisions of this Court or another state court of last resort or of a United States Court of Appeals.

In light of the foregoing, Respondent would suggest that this Court should decline to exercise its discretionary jurisdiction over this case.

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 15.1, Respondent accepts Petitioner's Statement of the Case except for the following "perceived misstatements of fact or law":

(1) The most significant omission from Petitioner's "Statement of the Case" is the fact that, after defense counsel's objection to the prosecutor's use of peremptory challenges to excuse two minority members of the venire, the prosecutor did give valid, race-neutral reasons for excusing the two African-American prospective jurors in question.

On appeal, in response to Petitioner's *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) claim, Respondent argued, not only that the claim was procedurally barred because of defense counsel's failure to preserve the issue by appropriate motion, but also that the prosecutor had given sufficient, valid race-neutral reasons for striking the two African-American members of the venire, Ms. Harris and Mr. Worrell. The trial court did not refuse to inquire into the reasons for the prosecutor's use of his peremptory challenges as Petitioner suggests. The prosecutor stated on the record that he struck Ms. Harris because she had a son who was in prison. He stated that Mr. Worrell was challenged because he had been noncommittal when asked about the legalization of marijuana. (R.9).

(2) Petitioner contends that the prosecutor used his peremptory challenges to exclude two prospective African-American jurors and one Hispanic juror. While it is true that the two African-Americans were excused by the State, the Hispanic juror, Juror Number 1, Ms. Gonzalez, was excused by the defense. (R.4,7).

(3) Under Florida law, the District Courts of Appeal are not "intermediate appellate courts" as Petitioner suggests. *See Chrysler Corp. v. Wolmer,* 499 So. 2d 823, 828 (Fla. 1986),

citing *Jenkins v. State,* 385 So. 2d 1356, 1357 (Fla. 1980) and *Ansin v. Thurston,* 101 So. 2d 808, 810 (Fla. 1958).

(4) Petitioner's comments about what questions were asked during oral argument in the Fifth District Court of Appeal of the State of Florida are not matters of record and there is no way of knowing whether the District Court's affirmance on the *Batson* issue was based upon procedural bar or upon the issues total lack of merit.

REASONS FOR DENYING THE WRIT

I. REVIEW ON CERTIORARI IS NOT A MATTER OF RIGHT, BUT OF JUDICIAL DISCRETION. THERE IS NO CONFLICT BETWEEN THIS COURT'S DECISION IN *BATSON V. KENTUCKY* AND THE AFFIRMANCE WITHOUT OPINION OF PETITIONER'S CONVICTION AND SENTENCE BY THE STATE DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE.

As previously noted in the State of Florida's jurisdictional statement, Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. Section 1257(a). However, the per curiam affirmance of Petitioner's conviction and sentence without opinion by the Fifth District Court of Appeal of the State of Florida does not draw into question the validity of any United States treaty or statute, the constitutionality of any Florida state statute or any title, right, privilege or immunity specially set up or claimed under them. Likewise, under U.S. Sup. Ct. Rule 10.1(b) and (c), the Fifth District Court's per curiam affirmance did not decide any federal question in a way that conflicts with applicable decisions of this Court or another state court of last resort or of a United

States Court of Appeals. In Florida, a per curiam appellate decision with no written opinion has no precedential value. *Department of Legal Affairs v. District Court of Appeal, Fifth District,* 434 So. 2d 310, 311 (Fla. 1983).

In light of this fact, Petitioner has failed to establish "any special or important reasons" for this Court to exercise its discretionary jurisdiction and to grant the Petition for Writ of Certiorari. The Florida District Court's per curiam affirmance without opinion of Petitioner's conviction for possession of approximately two ounces of marijuana and his probationary sentence imposed thereon presents no substantial federal question.

II. THE FLORIDA COURTS HAVE NOT ADDED ANY ADDITIONAL SUBSTANTIVE AND PROCEDURAL HURDLES TO OBTAINING APPELLATE REVIEW OF A CLAIM PURSUANT TO THIS COURT'S DECISION IN *BATSON V. KENTUCKY,* 476 U.S. 79, 106 S. CT. 1712, 90 L. ED. 2D 69 (1986).

Petitioner contends that the District Court's decision was based upon a procedural bar and that the merits of his claim were never considered. That is pure conjecture on his part. While it is true that defense counsel waited until after the jury had been selected to make his *Batson* objection and made no motion to strike the panel or motion for mistrial, it is not clear that the District Court's per curiam affirmance was not based on the fact that the prosecutor had given valid, race-neutral reasons for excusing the two African-American prospective jurors in question. *See State v. Slappy,* 522 So. 2d 18 (Fla.), cert. denied 487 U.S. 1219, 108 S.Ct. 2873, 101 L. Ed. 2d 909 (1988) and *State v. Neil,* 457 So. 2d 481 (Fla. 1984).

The State peremptorily challenged prospective juror number seven, Ms. Harris, and prospective juror number nine, Mr. Worrell. After the entire jury panel was selected, defense counsel announced his objection to the State's challenges to these two African-American members of the venire. Despite the fact that these objections were not timely made, the prosecutor volunteered that he struck Ms. Harris because she had a son in prison and that he would never put someone in that position on a jury. He said that Mr. Worrell had been noncommital when asked about his views on the legalization of marijuana. A juror's opinion on that issue could be crucial in a marijuana possession prosecution like the instant case. Both of these reasons for the State's use of its peremptory challenges were perfectly valid and reasonable and had nothing whatsoever to do with Mr. Worrell's or Ms. Harris' racial background.

As for Petitioner's contention that the District Court's decision in *Joiner v. State,* 593 So. 2d 554 (Fla. 5th DCA 1992), has "...added substantive and procedural burdens to this Court's decision in *Batson,* which a defendant in Central Florida trial courts must now satisfy in order to obtain appellate review in Florida", the Florida Supreme Court has since reviewed that decision and specifically disapproved the District Court's suggestion that the preferred procedure for preserving this issue is to move to strike the jury panel. *Joiner v. State,* 18 Fla. L. Weekly S280 (Fla. filed May 13, 1993). (Appendix A-1).

In *Jefferson v. State,* 595 So. 2d 38, 41 (Fla. 1992) and in *Aldret v. State,* 606 So. 2d 1156 (Fla. 1992), the Florida Supreme Court held that, when there has been an improper use of a peremptory challenge, it is not necessary that the entire jury pool be stricken. The trial court may simply use its discretion to seat the improperly challenged juror. In the instant case, defense counsel should have voiced his objection to the prosecutor's allegedly improper use of his

peremptory challenges at the time they were exercised rather than waiting until the jury had been selected and then deciding he would prefer another panel. Petitioner has failed to demonstrate that the District Court's per curiam affirmance of his conviction and sentence has, in any way, "added substantive and procedural burdens to this Court's decision in *Batson*."

Parenthetically, the State of Florida has held that a white defendant, like Petitioner, has standing to object to the prosecutor's use of peremptory challenges to exclude members of cognizable racial groups even though the defendant is not a member of any of those groups. *Kibler v. State*, 546 So. 2d 710, 712 (Fla. 1989). However, the fact that a defendant is of a different race from the challenged jurors may be relevant to the issue of whether the challenges were made for reasons related to race, i.e., where the defendant and victim are of different racial backgrounds.

However, in a case such as this one, where the defendant is a white male charged with the "victimless" crime of possession of marijuana, and where the prosecutor gave valid, race-neutral reasons for his peremptory challenges, there is no reason to suspect any hidden, racially-related motivation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

JOHN PHILLIPS ORLEBECK,

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v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX TO BRIEF OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI

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Eddie Joiner v. State of Florida, 18 Fla. L. Weekly S280 (Fla. filed May 13, 1993) A-1

EDDIE JOINER, etc., Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida, Case No. 79,657, May 13, 1993. Application for Review of the Decision of the District Court of Appeal — Direct Conflict Decisions, Fifth District — Case No. 91-99 (Orange County), James B. Gibson, Public Defender; and Kenneth Witts and Sophia B. Ehringer, Assistant Public Defenders, Seventh Judicial Circuit, Daytona Beach, Florida, for Petitioner. Robert A. Butterworth, Attorney General; and David G. Mersch and Nancy Ryan, Assistant Attorneys General, Daytona Beach, Florida, for Respondent.

(SHAW, J.) We review *Joiner v. State,* 593 So. 2d 554 (Fla. 5th DCA 1991), based on conflict with *Kibler v. State,* 546 So. 2d 710 (Fla. 1989), and *Jefferson v. State,* 595 So. 2d 38 (Fla. 1992)[1] We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The Fifth District Court of Appeal affirmed the convictions of Eddie Joiner (Joiner) for possession of a controlled substance and resisting arrest without violence. Joiner contends that *State v. Neil,* 457 So. 2d 481 (Fla. 1984), *clarified,*

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1 Conflict was also alleged with *Adams v. State,* 559 So. 2d 1293 (Fla. 3d DCA, *dismissed,* 564 So. 2d 488 (Fla. 1990, and *Charles v. State,* 565 So. 2d 871 (Fla. 4th DCA 1990). These cases are distinguishable and therefore are not in conflict. The district court in *Adams* held that the *State v. Neil,* 457 So. 2d 481 (Fla. 1984) *clarified, State v. Castillo,* 486 So. 2d 565 (Fla. 1986), issue was properly preserved for appellate review when defense counsel pointed out that the juror struck by the State was African-American, asserted that the State could not give a reasonable explanation for challenging the juror and was denied the inquiry required by *Neil.* The question whether objection to the final panel was additionally required was neither presented nor determined. The *Charles* court held that the *Neil* error was properly preserved because a codefendant's lawyer had preserved it and the objection of a codefendant's lawyer, by agreement with the judge, was an objection for Charles as well.

State v. Castillo, 486 So. 2d 565 (Fla. 1986), was violated when the State gave an inadequate reason for a peremptory challenge of an African-American juror. The district court held that Joiner failed to preserve his objection to the composition of the jury.

During jury selection the State peremptorily challenged Mrs. Gamble, an African-American. After the State had excused her, defense counsel asked the court to inquire as to the reasons and the court did so. The State replied: "I would like to constitute the jury with some people down the line I prefer more, and including another juror." *Joiner,* 593 So. 2d at 555-56. The judge erroneously ruled that the reason given for the strike satisfied the *Neil* inquiry in that it was racially neutral. There is no doubt that the State gave an inadequate reason for exercising a peremptory challenge against Mrs. Gamble. We held in *Kibler* that the reasons "I preferred other jurors" and "I liked [other jurors] better" were insufficient to rebut the defendant's assertion that the exercise of a peremptory challenge was racially motivated. Joiner's counsel ruling, voir dire continued, the jury was accepted by both parties, and Joiner was found guilty. In concluding that Joiner had failed to preserve the *Neil* issue, the district court reasoned:

> We believe that a party must do more than request a *Neil* inquiry and voice disagreement with an opponent's explanation. If a party is dissatisfied with a jury panel after hearing an explanation elicited through a *Neil* inquiry, some remedy should be requested of the trial court. For example, the defense in the instant case should have moved to strike the jury panel at some time during the jury selection process, but before the jury was sworn, at the latest. The defense did not do this; on the contrary, at the end of the jury selection, the defense stated that the jury was acceptable. Further, no mention of the jury selection was in the motions for acquittal during

> the trial, and it was only after receiving the adverse verdict and judgment that the issue was again raised in a motion for acquittal or new trial.

Joiner, 593 So. 2d at 556 (citation omitted).

We held in *Jefferson* that striking the entire jury panel is not the only remedy for a *Neil* violation. There we held that seating the improperly challenged juror is a proper remedy for a *Neil* violation. We agree with Joiner that a new panel may exacerbate rather than alleviate the constitutional violation *Neil* is designed to remedy. We therefore disapprove the lower court's suggestion that the preferred procedure for reserving the issue is to move to strike the jury panel. We also disagree with Joiner that a motion for judgment of acquittal is designed to test the sufficiency of the evidence against a defendant and is therefore an inappropriate vehicle for a *Neil* objection. *Anderson v. State,* 504 So. 2d 1270 (Fla. 1st DCA 1986).

We do not agree with Joiner, however, that he preserved the *Neil* issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his *Neil* objection when he accepted the jury.[2] Had Joiner renewed his objection or accepted the jury subject to his earlier *Neil* objection, we would rule otherwise. Such action would have apprised the trial judge that

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2 Were we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.

Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

We take this opportunity to clarify a misapprehension on the part of the State. The State argues that because the juror who replaced Mrs. Gamble was also an African-American, any *Neil* violation was cured. This argument misconstrues our holding in *Taylor v. State,* 583 So 2d 323 (Fla. 1991). *Taylor* held that a substantial likelihood that the State was exercising its peremptory challenges in a discriminatory way had not been shown and therefore the trial court had not erred in refusing to require the State to provide its reasons. We decline the State's invitation to rule that as along as an improperly challenged juror is replaced by a member of the same minority the constitutional infirmity is cured. Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause. *State v. Slappy,* 522 So. 2d 18, 21 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). Were we to endorse the State's view we would retain no practical device for redressing each person's right to serve on a jury free of being stricken for racially discriminatory reasons.

Accordingly, we approve the result in the district court below, although not the reasoning.

It is so ordered. (BARKETT,C.J., and McDONALD, GRIMES, KOGAN and HARDING, J. J., concur. OVERTON, J., concurs in result only.)